

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

SUIT NO. 2287 OF 1983

East African Traders ... Plaintiffs

V/s

The National Agriculture Co-op.
Marketing Federation of India Ltd. ... Defendants

Mr. H.T. Attari i/by H. Doctor & Co. for the plaintiffs.

Mrs. C. Shankar for the defendants.

CORAM: P.V. KAKADE, J.

DATED: 29TH OCT., 2004.

P. C.:

1. The plaintiffs have filed the suit against the defendants for recovery of the amount of Rs.3,53,017.97 which includes the principal amount of Rs.2,73,606.81 ps. alongwith the interest at the rate of 21% p.a. for the balance amount of commission on the basis of Cost Insurance Freight (in short CIF) value of the consignment and for the amount towards dues in the freight rate.

2. The plaintiffs were a partnership firm duly registered under the Indian Partnership Act. The

defendants are Co-operative Society registered under the Delhi Co-operative Societies Act. In the month of April, 1980, the plaintiffs entered into an agreement with the Government of the Federal Islamic Republic of Comorose (hereinafter referred to as "the said foreign purchasers") for sale of Rs.10,000/- tones of rice at the rate of US Dollar 345 per tonne, Moroni or Mutsamudu. The foreign purchasers by their telegraphic message dated 5.4.1980 confirmed the said agreement. On 16.1.1980, one Mr. Doshi, partner of the plaintiffs firm had a meeting Mr. S.K. Iyyer, Foreign Trade Officer of the defendants. At the said meeting, it was agreed between the parties thus -

(a) The defendants will supply to the said foreign purchasers 10,000 M.T. of the said rice packed in second hand double gunny bags of 50 kgs. nett, each at or for the price of US Dollars 345 CIF per tonne, Moroni or Mutsamudu.

(b) The price of US Dollars 345 CIF per tonne included 1.3 percent foreign agency commission and 2 percent commission for the plaintiffs on the CIF value of the freight rate of US Dollars 55 per metric tonne.

(c) If the defendant were required to pay freight of more than US Dollars 55 per metric tonne, the same would be deducted from the commission due to the plaintiffs and if the freight was less than US Dollars 55 per metric tonne, the difference between the freight at the rate of US Dollar 55 and the actual freight paid would be divided equally between the plaintiffs and the defendants.

(d) Shipment of the rice will be made by the defendants to the said foreign purchasers within 60 days of the receipt of the letter of credit by the defendants.

The plaintiff by their telex message No.2 dated 17.4.1980 recorded that the defendants had confirmed the said business on the terms mentioned therein. In the said message, it was stated that, "steamer freight US Dollar 55 per metric tonne, any increase or decrease as per our discussions." The plaintiffs also called upon the defendants to confirm the above terms and conditions so that the plaintiffs could telex the foreign buyers to

open a letter of credit in favour of the defendants through the Canara Bank, Mumbai. Defendants, by their telex message dated 17.4.1980 confirmed the business with the plaintiffs on the basis of the terms and conditions discussed with Mr. Doshi vide Exh.P-6, in new Delhi. The defendants by their telex message No.239 dated 21.4.1980 recorded that they had already confirmed business by their telex dated 17.4.1980 and stated that as the business was on CIF basis the responsibility of arranging the vessel was with the plaintiffs. Defendants also required the plaintiffs to arrange for the vessel and called upon them to indicate the full terms and conditions for the said vessel. By the said telex the defendants also gave instructions for opening of a letter of credit by the foreign purchasers in favour of the defendants. It was also later agreed that insurance would be done by the foreign purchasers of destination and that the defendants would ship the said consignment of rice to the said foreign purchasers for the cost and freight price of US Dollars 342 per metric tonne.

Thereafter the plaintiffs approached the Shipping Corporation of India Ltd. (hereinafter referred to as "the Corporation") to carry the said cargo and the said Corporation informed the plaintiffs of the freight

charges. as a result of the efforts made by the plaintiffs the Corporation agreed to reduce their freight charges to US Dollar 53 per metric tonne, vide Exh.P-8 of the plaintiffs. Thereafter, on 7.5.1980, the plaintiffs received a telex from the Corporation confirming them that they were agreeable to the said shipment of 10,000 tonnes of rice in two lots of 6000/4000 tones at the freight rate of %@ US Dollars per metric tonne in the last week of May/June 1980. In or about May 1980, the plaintiffs negotiated with M/s. James Mackintosh & Co. Pvt. Ltd. for obtaining a vessel to carry the cargo of rice at the rate of US Dollar 48 per metric tonne on liner terms. On 29.5.1980, Mr. Doshi met one Mr. Menghany and other officers of the defendants of Delhi and informed Menghany of the offer received from James Mackintosh & Co. Pvt. Ltd. Thereafter meeting took place between the representatives of the plaintiffs and defendants and it was decided that the plaintiffs would share the difference between US Dollars 55 and US Dollars 48 per metric tonne even if the defendants could arrange for the freight rate lower than US Dollars 55 per metric tonnes and 48 per metric tonnes even if the defendants could arrange for the freight rate lower than US Dollars 55 per metric tonne. Mr. Doshi agreed to the said suggestion. It was agreed upon that the plaintiffs would

not claim any share in the difference in freight between US Dollars 48 per metric tonne and the actual freight paid.

In the month of July, 1980 the said cargo was shipped by the defendants under six bills of lading. Defendants also sent their six invoices to the foreign purchasers for the aggregate sum of US Dollars 34,20,000. Copies of the said invoices were also forwarded to the plaintiffs.

In these circumstances, it is the case of the plaintiffs that defendants became liable to pay to the plaintiffs a sum of Rs.5,29,411.16 ps. as 2% commission on the C.I.F. value and the sum of Rs.2,73,606.81 ps. being 50% of the difference in freight calculated at the rate of US Dollar 55 and US Dollar 48 per metric tonne. Accordingly, debit notes for the sum of Rs.5,29,411.16 and Rs.2,73,606.81 were sent by the plaintiffs to the defendants. The plaintiffs repeatedly called upon the defendants to pay the said amount but in vain.

On 19th December, 1980, defendants' Bombay office made payment to the plaintiffs of the sum of Rs.4,00,000/- by cheque. The said amount was accepted by the plaintiffs

against their said debit notes dated 1st Sept., 1980. Thereafter defendants' Bombay office informed that their Delhi office had decided to release payment of commission to the plaintiffs on F.O.B. basis and that a balance of Rs.54,135.72 was payable by the plaintiffs, however, the plaintiffs refused to accept the said sum in full and final settlement of the claim and insisted that the defendants should pay the impugned as per the contract. On 4.1.1983, plaintiffs' representative Mr. Doshi had a meeting with one Mr. M.L. Island of the defendants at Delhi. After the said meeting, Mr. Ilwadia agreed to send telex to the defendants' Bombay office instructing them to pay to the plaintiffs further sum of Rs.50,000/- on account and it was informed that the plaintiffs were entitled to 2% commission on C.I.F. value of the said consignment and Mr. Ilwadia assured the plaintiffs that he would put up the papers to the higher authorities, however, did not materialize. On 8.6.1983 defendants paid to the plaintiffs further sum of Rs.50,000/- by cheque which was accepted by the plaintiffs. Therefore, plaintiffs through advocate's letter dated 11.7.1983 called upon the defendants to pay the balance amount of commission on the basis of C.I.F. value of the consignment and the said sum of Rs.2,73,606.81 ps. towards the difference in the freight rate vide Exh.P-26

on record. The defendants, by their reply refused to discharge their liability to pay commission as well as their share in the difference of freight charges as demanded. Therefore, after taking into account all payments made, the amount of Rs.3,53,017.97 was found due from the defendants at the foot of the entire transaction for which the suit is filed.

3. The defendants, in their written statement denied that there was any agreement to pay commission on C.I.F. value. The defendants also denied that there was any agreement with regard to the alleged share of difference in the freight. The defendants' contention is that no contract was concluded between the parties. The defendants also raised various issues including the requirement of the statutory notice and submitted that plaintiffs' claim deserves to be dismissed with costs.

4. Issues were settled on the basis of said pleadings. The settled issues and my findings thereon are as under:-

(1) Whether the defendants prove that the suit is liable to be dismissed as alleged in para 1 of the written statement ?

(2) Whether the plaintiffs prove that they are a

registered partnership firm ?

(3) Whether the plaintiffs prove that the plaintiffs were to receive from the defendants commission on C.I.F. basis ?

(4) Whether the plaintiffs prove that there was an agreement to share equally the difference in freight rate viz., US Dollar 55 per metric tonne and the actual freight rate ?

(5) Whether the plaintiffs prove that they are entitled to receive from the defendants (a) Rs.4,135.72 ps. being the balance outstanding commission; (b) Rs.75,275.44 ps. being the difference in commission at the rate of 2% of the consignment value on CIF basis instead of FOB basis; and (c) Rs.2,75,606.81 being 50% of the difference in reduced freight rate with interest thereon at the rate of 21% p.a. till payment and/or realization ?

(6) What order and relief ?

My findings on the issues are :-

- (1) Affirmative.
- (2) Affirmative.
- (3) Affirmative.
- (4) Affirmative.
- (5) Affirmative.
- (6) As per final order.

5. Both the parties have relied upon the oral evidence as well as documentary evidence led on their behalf. Mr. Doshi, partner of the plaintiffs' firm led evidence on behalf of the plaintiffs, where as Mr. Upadhyay was examined on behalf of the defendants who was working as the Assistant Manager and was stationed at Delhi and was stationed at the relevant time in the Bombay Branch office of the defendants.

6. At this juncture, it must be noted that the relevant transaction between Mr. Doshi for the plaintiffs and one Mr. Iyyer, the Manager (Foreign Trade) on behalf of the defendants did take place, however, the defendants chose not to examine Mr. Iyyer and instead have led evidence of Mr. Upadhyay who was not in Delhi at the relevant time when the transaction took place.

7. There is no dispute with regard to the documents on record as exchange of correspondence, telex messages and other documents are admitted parts of the dispute.

The record shows that the defendants by their telex message No.184 dated 17.4.1980 (Exh.P-6) confirmed the business on the terms and conditions discussed with Mr. Doshi on 16.4.1980 which was recorded by the plaintiffs in their telex message No.2 dated 17.4.1980 vide Exh.P-5, wherein it has been clearly stated that business would be confirmed on C.I.F. basis and it would include 1.3% foreign agents commission and 2% shipment commission. (Steamer freight US Dollar 55 per metric tonne, any increase or decrease as per our discussion).

The defendants by their telex message No.239, dated 21.4.1980 (Exh.P-7) recorded that they have already confirmed the business by their telex dated 17.4.1980 (Exh.P-6) and stated that, as the business was on C.I.F. basis, responsibility for arranging the vessel lies with the plaintiffs and called upon the plaintiffs to arrange for the vessel indicating the full terms and conditions. Therefore, in these circumstances, it is seen to be confirmed that defendants have accepted the offer of the plaintiffs and have agreed to act on them, which amounts

to conclusion between the parties which is evident from the said two telex messages.

It is also to be noted that the very conduct of the defendants led to the conclusion that the defendants have created the contract as concluded. The pleadings and documents discloses that there were conclusive negotiations between the parties. The proposals set-forth vide Exh.P-5 are required to be read in conjunction with telex dated 17.4.1980 and telex dated 21.4.1980 sent by the defendants to the plaintiffs which reflect that the defendants had confirmed the business and as the business is on C.I.F. basis, the responsibility for arranging the vessel was imposed on the exporter.

On the basis of this evidence, it is submitted that by virtue of Sec.7 of the Contract Act, the defendants having not rejected the acceptance were deemed to have accepted the contract and the defendants failed to reject the terms and conditions of the said proposal on C.I.F. basis. The defendants' witness Mr. Upadhyay also admitted that they had confirmed the business on the basis of telexes and they had no further record to show that prior to July, 1980 it was agreed upon that business transaction between plaintiffs and defendants was on F.O.B. basis. I,

therefore, have no hesitation to accept the argument advanced on behalf of the plaintiffs in order to hold that there was conclusion between parties. This is especially so when the defendants are unable to prove their case for want of sufficient evidence. Mr. Upadhyay, witness of the defendants was an officer of Bombay Branch of the defendants, whereas the entire transaction was carried out at their Delhi office. Mr. Upadhyay also admitted that the Branch Manager Mr. Gupta informed him about the transaction and he was giving evidence only on the basis of available record in the office and not out of his personal knowledge. In view of these aspects, I hold that the plaintiffs' evidence is sufficient to establish the said claim.

8. The notice stipulated under Delhi Co-operative Societies Act, 1972 is seen to have been given by the plaintiffs to the defendants on 11.3.1981. On 8.6.1983, the defendants paid to the plaintiffs further sum of Rs.50,000/- which was duly appropriated towards two debit notes and thereafter when negotiations are seen to have failed, it appears that the plaintiffs have given notice to the Director and Central Registrar of Co-operative Societies on 3.8.1983.

In view of this position, I have answered the issues accordingly and hold that the plaintiffs' claim deserves to be accepted and hence the following order is passed :-

O R D E R

1. The suit stands decreed with costs.
2. The defendants shall pay Rs.3,53,017.97 to the plaintiffs with interest at the rate of 12% p.a. from the date of the suit till realization.

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